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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 856

J. D. COLLINS,

Petitioner,

vs.

W. R. WAYLAND, JANE WAYLAND, FRED G. HOLMES, LORE W. HOLMES, DEL E. WEBB AND HAZEL WEBB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS A. FLYNN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:

Your petitioner, J. D. Collins, respectfully prays for a Writ of Certiorari to review the Decree and Opinion recorded by the Ninth Circuit Court of Appeals, sitting at San Francisco, on Monday, January 3, 1944, and the Judgment affirming that of the District Court of Arizona, Civil 113 Phoenix, dismissing the cause; and the order of the Court, January 18, 1944, which denied the petition for a rehearing.

Statement of Matter Involved.

A suit for damages, rent, trespass and conversion, in an amount exceeding $3000.00, exclusive of interest and costs, was instituted on April 24, 1940, in the District Court of the United States for the District of Arizona, by the petitioner, as plaintiff, who was a resident and citizen of the State of Oregon, against the respondents, as defendants, all of whom were residents and citizens of the State of Arizona T. R. Ps. 2 and 7.

After the respondents had filed an answer and an amended answer, their attorneys served upon the attorney for petitioner a notice that on the 20th day of November, 1942, they would take the deposition of the petitioner; who, as Dean Collins, was engaged in War Work on the editorial staff of a Daily Newspaper in Portland, Oregon, a fact well, and publicly, known, with a home in that City where he resided with his family, all citizens of Oregon; upon oral examination at the office of respondents' attorneys in Phoenix, Arizona, (T. R. p. 23). This notice was not filed in court until December 4th, 1942, and was a retroactive notice for a deposition to be taken November 20, 1942. Two weeks prior thereto. Contemporaneously with the filing of this two weeks retroactive notice the respondents filed a motion to strike petitioner's complaint and for default judgment against petitioner basing this motion on the ground that petitioner had failed to appear for the taking of his deposition at the time and place fixed in the notice, (T. R. ps. 18 and 23).

On December 18, 1942, the attorney for petitioner served and filed an argument in opposition to said motion of the respondents in which it was stated that no objection was made to taking the deposition at the place of residence of the petitioner in Portland, Oregon, but that on account of the great distance, the prevailing conditions, (The United

States being then at War, and gasoline having been rationed, and none permitted for unnecessary travel) the large expense involved in such a trip, and the requests of the government that unnecessary travel be avoided. (The railroads refusing to take civilians when seats were needed for the military.) On page 29 of the T. of R. the attorney sets forth that for the court to compel him to come would be to *deprive the plaintiff of due process of law* and of *the equal protection of the laws.* Also, on page 30 of the T. of R., the attorney says:

> "The new rules were intended to simplify the formalities of taking depositions but they were not intended to extend the territorial jurisdiction of the courts beyond that fixed by law. The old rules relative to the taking of the deposition of a non resident are still controlling."

At no time does plaintiff's attorney submit his client's personal body to the jurisdiction of the court. On page 29 of the T. of R. the attorney says:

> "We think that the deposition was noticed merely as a device to procure the dismissal of this action. It has been held unconstitutional to render a personal judgment on service outside the state."

The motion to strike the complaint and for default judgment was heard on December 21, 1942, and at that time an order was made by the trial court requiring the petitioner to appear for the taking of his deposition at the office of respondents' attorneys in Phoenix, Arizona, on January 11, 1943, and that otherwise the complaint would be dismissed (T. R. p. 31).

On January 12th, 1943, the attorneys for the respondents served on the attorney for petitioner and filed a notice that on January 18th, 1943, the respondents would present to the court an order striking from the files the petitioner's

complaint and dismissing the action (T. R. p. 32). A copy of the proposed order and an affidavit of one of the attorneys for respondent stating that the petitioner had failed to appear for the taking of his deposition on January 11, 1943, were served and filed with the motion (T. R. 32 & 33). Affidavit on page 34 of the T. of R. On page 34 Plaintiff's attorney received copy.

On January 18, 1943, the trial court granted this motion, and entered an order striking the petitioner's complaint from the files and dismissing the action (T. R. ps. 35 & 36). This Minute Entry was signed by the Judge but the filed order served was never signed, but a similar unserved, written, order was signed. Pages 37 & 38, T. of R.

An appeal was taken by the petitioner from this order to the United States Circuit Court of Appeals for the Ninth Circuit, which court on January 3, 1944, affirmed the judgment entered by the trial court (T. R. ps. 57 & 58). The Opinion of the Circuit Court of Appeals (T. R. ps. 53 to 57) is reported in Volume 139 Federal (2d) page 667. Petition for rehearing denied January 19, 1944 (T. R. p. 58).

Statement of Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 3, 1944 (T. R. p. 57). The petition for rehearing was seasonably filed on January 18, 1944, and was denied on January 19, 1944 (T. R. p. 58). The Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 C. 229 (43 Stat. 938, 28 U. S. C. A. Sec. 347). The jurisdiction of the District Court depended entirely on diverse citizenship in the complaint. A description of the land involved is on Page 4, T. of R. This is an irregular piece of ground, at no point Twenty (20) feet wide. The least width being 20.94 feet, at the North. The greatest width

being 155.94 feet East and West by 25 feet North and South. See T. of R. p. 4. When the defendants alleged on Page 11 T. of R., that a strip 20 feet wide by an indeterminate length (Page 12) had been adjudicated in the Superior Court (a lower court) and on Page 13:

> "* * * is public property and dedicated to public use as a public alley," and in Section 2 allege

that:

> "That the property described in said judgment is identical to * * * property described in plaintiff's complaint," and allege in Paragraph IV, Page 11, Section 1, that Wayland, Holmes and Webb were in privity with the City of Phoenix, and that it had

been adjudged to be public property and dedicated to public use it was an attempt to take for themselves and their co-associate, the City of Phoenix, as shown on page 41, under Points, Section 3:

> "* * * Likewise no showing whether the acts complained of were committed on the 'Identical Part' or on some other part. * * *"

Wayland, Holmes and Webb, as part of The Public, to whom the Identical strip was dedicated for Public Use, themselves raised the Federal Question of:

> "Taking private property without due process of law and without compensation.", at the very

inception of the cause.

When the court upheld respondents' contention that when the complaint was filed that Paragraph III (T. R. p. 3), giving description according to Old Townsite of Phoenix, Book 1, of Maps, page 5, was "Identical" with property described by land owned by private persons according to Book 2, of Maps, page 69, of different dimen-

sions, Paragraph III (T. R. ps. 14, 15, 16 and 17), and denied petitioner the "right to his day in court," (T. R. p. 42, S. 7) The Court violated, and denied to petitioner:

His Equal Protection under the Federal Constitution.

As no Federal Court has jurisdiction over the Person of a Citizen and Resident of an Alien State, and no State Court has such jurisdiction, and Federal Courts follow State Statutes, the instant court; when it entered an order commanding a citizen and resident of Oregon to come to Arizona on a day certain, and if he did not come, fixing his sentence before the crime was committed, that all of his rights to recover the many thousands of dollars that Wayland, Holmes and Webb, had taken from him; deprived him, not only of all of his rights in the Decalogue, but all of his rights under the Constitution of the United States, and deprived him of:

> His Equal Protection of the Laws, and took his property without due process of law and without compensation.

Also it deprived a reputable citizen of the United States of the control of his own person and violated all of the principles that inspired the writing of the Constitution and all of the principles of the Allies in their war against the Axis.

When the instant court held that a non-resident could not come into its court for the recovery of his property without submitting his person to the jurisdiction of Wayland, Holmes and Webb, private individuals, who demanded that J. D. Collins come a distance of over a thousand miles, at an enormous expense, for a purpose that could have been accomplished by themselves, namely, the taking of a written deposition in Portland, Oregon, this court denied to petitioner

The Equal Protection and Jurisdiction of This Federal Court Such As Was Accorded to Wayland, Holmes and Webb, and Their Three Wives.

The Petition for Rehearing filed in the Appellate Court January 18, 1944, and denied the next day, is plead in this Statement of Jurisdiction in its entirety as fully and completely as though copied herein.

When the District Court of Arizona commanded the petitioner to disregard the restrictions against unnecessary travel promulgated by the Commander in Chief of the United States Armies and those in positions of trust and those in charge of transportation for soldiers and gasoline rationing, all in force the First day of December, 1942, this court entered an order directly in opposition to the furtherance of the WAR EFFORT of the United States and its allies; a condition not foreseen by the writers of the Declaration of Independence, and of the Constitution and its Amendments. However, in the case at bar:

> A Deficiency is as much a matter of jurisdiction as an Existent.

Many Federal Questions involving the Jurisdiction of the Supreme Court of the United States were, and are, presented invoking the "Rules of Civil Procedure for the District Courts of the United States" adopted by the Supreme Court January 3, 1938, and

> The Deprivation of Petitioner of Property Without Due Process of Law.

Questions Presented.

1—The first question presented is whether a citizen and resident of one State who institutes an action in a United States District Court of another State far distant from the State of the plaintiff's residence and citizenship can be compelled to go to the place where suit was brought for the purpose of having his deposition taken prior to trial.

2—The second is whether a trial court, after presentation to it of the facts and after objections to such procedure, could rightly enter an order requiring a plaintiff, under the circumstances stated in "1", to travel from a distant State, without any provision for the payment of expenses, for the purpose of having his deposition taken, and providing that the action would be dismissed upon non compliance with such order.

3—The third is whether a United States District Court has the right or power to enter a judgment dismissing a plaintiff's action upon failure of a plaintiff, under the circumstances stated in "1" and "2", to comply with an order such as was made in this case, to appear and submit to the taking of his deposition, especially with the WAR TIME BAN on unnecessary travel.

Reasons for Granting the Petition.

A.

The question involved in this case, which was decided by the District Court and by the Circuit Court of Appeals, is an important question of Federal law, which has not been, but should be settled by this Court. The order of the District Court requiring the petitioner to travel from Portland, Oregon, to Phoenix, Arizona, a distance of considerably more than one thousand miles, at his own expense, for the purpose of giving his deposition at the office of respondents' attorneys, and the subsequent order dismissing petitioner's action on account of his failure so to do, which orders were sustained by the Circuit Court of Appeals, deprived the plaintiff of his right to the use of the Federal Court and deprived him of his property without due process of law. Such action under the circumstances here presented was never intended to be authorized by the Federal Rules of Civil Procedure and should not be allowed to stand. It is of great importance that non residents of a State be per-

mitted to maintain and prosecute actions in the District Courts of the United States when the jurisdictional requirements exist. If the rule laid down in this case that a non resident plaintiff in a suit in a Federal court can be ordered to travel thousands of miles at his own expense for the taking of his deposition before trial should be countenanced, the result would be to deprive many persons having meritorious causes of the use of the Federal courts.

B.

The Circuit Court of Appeals by its judgment so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervision. The accepted and usual course of judicial proceedings in the matter of the taking of a deposition of a non resident opposite party on oral examination before trial has been that such a deposition should be taken at the place of residence of such party. A party who is a non resident of the state of suit has not, under the accepted and usual course of proceedings, been ordered or required to leave his place of residence and to travel to a distant state to give his deposition. His deposition has been taken on oral examination or on written interrogatories at his place of residence. It is not within the accepted or usual course of judicial proceedings to order a non resident party to come to another state for the taking of his deposition under any circumstances, and especially is this true of an order such as was entered in this case which made no provision for the payment of petitioner's expenses, but required him to come to Arizona at his own expense, and with no consideration for gas rationing and the impossibility of getting gasoline for automobile travel, and with no consideration for the fact that buses and trains took no civilians when their transportation was needed for the armed forces, and with no consideration for the fact that a member of an editorial staff would in pre-

sumption be engaged in necessary war work, and with no consideration for the fact that no judicial proceeding was possible that forced a litigant to place himself in opposition to the furtherance of a war for the freedom of the whole World.

In order to secure to non resident litigants in Federal courts the protection to which they are entitled, the departure here made from the accepted and usual course of judicial proceedings calls for the power of supervision of this court.

Your petitioner presents herewith as part of this petition a brief showing his views upon the questions involved, and also a Transcript of the Record in the Circuit Court of Appeals, also copies of petitioner's Opening and Reply Briefs and his Petition for a Rehearing.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue to review the judgment entered in the Circuit Court of Appeals for the Ninth Circuit in the case numbered and entitled on its docket, No. 10481, J. D. Collins, Appellant, *vs.* W. R. Wayland and Jane Wayland, his wife, Fred G. Holmes and Lore W. Holmes, his wife, Del E. Webb and Hazel Webb, his wife, doing business under the name of Del E. Webb Construction Company, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated ——— 1944.

Signed: THOMAS A. FLYNN,
Counsel for Petitioner.
Address 313 North Center Street,
Phoenix, Arizona.

———————,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of Courts Below.

No opinion was delivered by the District Court. The Opinion of the Circuit Court of Appeals (Circuit Judges Denham, Mathews and Healy, Judge Mathews writing) was filed January 3, 1944, and appears at page 53 of the Transcript of Record. It is reported in 139 Fed. (2d) 667.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C. A. Sec. 347). The Judgment of the Circuit Court of Appeals was entered January 3, 1944 (T. R. p. 57). The Petition for Rehearing was seasonably filed on January 18, 1944, and was denied on January 19, 1944 (T. R. p. 58). The Petition for Certiorari is filed within three months thereafter.

Federal Questions were, and are, presented involving the Federal Rules of Civil Procedure, and the:

Deprivation of petitioner of property without due process of law; and

Denial of his equal protection of the law.

Statement of the Case.

A statement of the facts and of the matter involved has already been made in the preceding petition, Page 1, which is hereby adopted and made a part hereof.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court dismissing the action by reason of the failure of petitioner

to come from Oregon to Arizona for the taking of his deposition.

2. In holding that petitioner (plaintiff below) could be required to travel from Portland, Oregon, to Phoenix, Arizona, at his own expense for the taking of his deposition.

3. In sustaining the order of the District Court requiring the petitioner to come to Arizona, and providing that the action would be dismissed upon his failure to do so. Also in sustaining a War Time Governmental requirement against unnecessary travel.

Argument.

First Point.

A non resident who brings a suit in a district court of the United States in a state far distant from his place of residence should not be compelled to go to the place where suit was brought for the purpose of having his deposition taken by the opposite party.

Prior to the adoption of the Rules of Civil Procedure for the district courts of the United States the accepted and usual course of proceedings in the taking of depositions of an opposite non resident party to a suit was that the deposition should be taken at the place of the residence or place of business of the party whose deposition was to be taken. This accepted and usual course of procedure was not changed by the Federal Rules.

Norton v. *Cooper Jarrett, Inc.* (D. C. N. Y.) 1 F. D. R. 92;

Cohen v. *Pennsylvania R. R. Co.* (N. Y. S. D.) 30 Fed. Supp. 419;

Fairweather Transportation Company v. *Chris-Craft Corp.*, 1 F. D. R. 509;

Lavarette v. *Continental Briar Pipe Company*, 25 Fed. Suppl. 80.

Especially has this been the case in the absence of any provision for the payment by the party desiring the deposition of the traveling and other expenses of the party to be examined. The trial court in makng the order requiring the petitioner to come to Phoenix, Arizona, from Portland, Oregon, and in ordering the dismissal of the action departed entirely from the accepted and usual procedure and this departure was sanctioned by the Circuit Court of Appeals. The Rules of Civil Procedure were promulgated not only for the purpose of expediting litigation and conserving the time of the courts, but also to serve to all parties the protection of the rights and interests which law and justice require.

Madison v. *Cobb,* 29 Fed. Supp. 975.

These purposes were not served by the action of the court in this case, and it is submitted that such action calls for the exercise by this Court of its supervisory powers in order that the error made and the resulting injustice may be corrected.

Second Point.

The trial court, which had all the facts and the objections of the petitioner before it at the time of its order of December 21, 1942, (T. R. p. 31) should not as was done by this order, have ordered the petitioner to appear at the office of the attorneys for the respondent in Phoenix, Arizona, for the taking of his deposition and such action should not have been upheld by the Circuit Court of Appeals.

At the time of the making of the order of December 21, 1942, there had been presented to the District Court by the Argument in opposition to the Motion to Dismiss (T. R. p. 27-30) filed December 18, 1942. All the facts,

including the residence of petitioner in Portland, Oregon, and the heavy expense and loss of time that would be occasioned by compelling the petitioner to come to Arizona. It must also have appeared to the court that there was very little, if any, reason for taking the deposition on oral examination, and that quite likely the respondents in giving the notice that they gave had in mind that in this way they might obtain the dismissal of the action. In disregard, however, of the facts the court made its order directing the petitioner to come to Arizona, and made no provision for the payment of his expenses. There is no authority for such procedure, and we believe that there is no other case in which such an order under similar circumstances has been entered or sustained, even in times of peace, and this was WAR TIME, with a ban on unnecessary travel, and to get gasoline for unnecessary travel an impossibility.

It may be claimed that since the petitioner did not, in the first instance, make a motion in accordance with Rule 30 (b) of the Federal Rules of Civil Procedure that the deposition shall not be taken, or that it may be taken, only, at some designated place other than that stated in the notice, or that it may be taken only upon written interrogatories, he should be precluded from objecting to the order made by the lower court. Such a claim, we submit, cannot prevail for the reason that opposition to the motion to dismiss (T. R. ps. 27-30) and the objections therein made served all the purposes of a motion under Rule 30 (b), and the order of December 21, 1942, requiring the petitioner to come to Arizona was made after this opposition had been filed and with the objections therein stated before the court. This being the case, the court should not have disregarded these objections and should not have made the order that was made.

THIRD POINT.

Since the order requiring the petitioner to come to Arizona from Oregon for the taking of his deposition was without right or authority of law, the order dismissing the action by reason of a failure to comply with such order should not have been entered or sustained.

The order requiring the petitioner to come to Arizona made no provision for the payment of his expenses. We have shown that under the facts before the court the order was unauthorized and should not have been made. It follows, of course, that the order dismissing the action should not have been sustained.

By this judgment an injustice has been done to the plaintiff and he has been deprived of substantial rights. In order that the Federal Rules of Civil Procedure may not be interpreted to authorize the hardships to non resident litigants in the Federal Courts that would result from the interpretation placed upon them by the District Court and the Circuit Court of Appeals, we believe that the questions here involved should be decided by this Court.

Wherefore, it is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

THOMAS A. FLYNN,
Counsel for Petitioner,
Address 313 North Center Street.

APPENDIX.

Rule 30. Depositions upon oral examination.

(a) Notice of examination: time and place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) Orders for the protection of parties and deponents. After notice is served for taking a deposition by oral examination, upon notice seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Rule 37. (d) Failure of party to attend or serve answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule

33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Rule 45. Subpoena. (d) Subpoena for taking depositions; place of examination. (2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

The references to the above Rules, and others, are not only in the preceding petition but are, also, in the Petition for Rehearing, which has been adopted in this petition as completely in its entirety, as though rewritten herein.

(3)

FILED
MAY 18 1944
CHARLES ELMORE CROPLEY
CLERK

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SNELL, STROUSS & WILMER
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Opinions Below

No opinion was filed in the district court. The opinion of the Circuit Court of Appeals, Ninth Circuit, filed January 3, 1944, is reported in 139 Fed. 2d at page 667, and appears at page 53 of the record herein.

Statement of the Case

On April 24, 1940, petitioner, a citizen of Oregon, filed, in the District Court of the United States for the District of Arizona, an action against respondents,

citizens of Arizona, for damages in the sum of $21,000. Desiring to take the deposition of petitioner on oral examination, respondents, on November 7, 1942, gave notice as provided in Rule 30 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. following par. 723e). The notice required petitioner to appear before a notary public at the office of respondents' attorneys in Phoenix, Arizona, at 10:00 o'clock A. M. on the 20th day of November, 1942.

Petitioner, disregarding the notice, did not appear before the notary public or at the place where his deposition was to be taken on November 20, 1942, or at all. On December 4, 1942, respondents served and filed a verified motion setting forth the above facts and praying the court to strike petitioner's complaint and to enter a judgment by default against petitioner as provided in Rule 37 (d) of the Federal Rules of Civil Procedure (28 U. S. C. A. following par. 723c). After due notice the court heard the motion and, on December 21, 1942, entered an order requiring petitioner to appear for the taking of his deposition at the office of respondents' attorneys in Phoenix, Arizona, on January 11, 1943; otherwise petitioner's complaint would be dismissed. Petitioner disregarded the order, and did not appear for the taking of his deposition on January 11, 1943, or at all. On January 12, 1943, respondents moved the court to dismiss the action, as provided in Rule 37 (d), supra. After due notice the court heard the motion, granted it, and on January 18, 1943, entered judgment dismissing the action. The judgment of the District Court was affirmed by the opinion and order of the Circuit Court of Appeals filed January 3, 1944, (139 Fed. 2d 667; recorded at page 53 of the record here-

in). Petition for rehearing was denied by the Circuit Court of Appeals January 18, 1944.

Summary of Argument

No proper case is presented for the issuance of a writ of certiorari.

Argument

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."
>
> Rule 38-5, Rules of the Supreme Court of the United States.

The character of reasons, given under this rule, which are to be considered in issuing a writ of certiorari are not applicable here.

The Petition for Writ of Certiorari seems to be based upon the ground or contention that the district court and the circuit court of appeals have so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this court's power of supervision.

The procedure in the district court, affirmed by the circuit court of appeals, was exactly as expressly provided by the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States.

Notice of taking petitioner's deposition on oral

examination was given as provided in Rule 30 (a).

Rule 30 (b) provides, upon motion seasonably made, for orders for the protection of parties or deponents who for any reason object to the taking of a desposition. Petitioner failed to avail himself of this rule. He filed no motion, but wilfully disregarded the notice of taking his deposition and failed to appear before the officer who was to take the deposition.

Upon motion duly served and filed pursuant to Rule 37 (d) praying that petitioner's complaint be dismissed and for a default judgment the district court, on December 21, 1942, ordered petitioner to appear on January 11, 1943, for the taking of his deposition; otherwise the motion would be granted. Petitioner disregarded this order and again wilfully failed to appear before the officer who was to take his deposition. The district court thereupon on January 18, 1943, granted respondents' motion and entered judgment dismissing the action. Rule 37 (d) provides:

> "If a party * * * wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, * * * the court on motion and notice may strike out all or any part of the pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

The proceedings in the district court, affirmed by the circuit court of appeals, followed and were in accord with the express provision of this rule. There

was no departure from "the accepted and usual course of judicial proceedings."

Roerich v. Esquire, Coronet, Inc., 1 F. R. D. 692;
Goldberg v. Raliegh M'f'rs., 28 Fed. Supp. 975;
Cohn v. Annunziata, 27 Fed. Supp. 975;
Madison v. Cobb, 29 Fed. Supp. 881;
Maresco v. Lambert, 2 F. R. D. 163;
Spaeth v. Warner Bros. Pictures, Inc., 1 F. R. D. 729.

Conclusion

It is respectfully submitted that the Petition fails to present a proper case for the issuance of a writ of certiorari and the Petition should be denied.

Respectfully submitted,

SNELL, STROUSS & WILMER
CHARLES L. STROUSS
FRANK L. SNELL
MARK WILMER

Appendix

Rules of Civil Procedure for the District Courts of the United States:

Rule 30. *Depositions Upon Oral Examination.*

(a) NOTICE OF EXAMINATION: TIME AND PLACE. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time

and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Rule 37. *Refusal to Make Discovery: Consequences.*

(d) FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.